



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

April 20, 2005

Ms. Karen Rabon  
Assistant Attorney General  
Public Information Coordinator  
Office of the Attorney General  
P.O. Box 12548  
Austin, Texas 78711-2548

OR2005-03424

Dear Ms. Rabon:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 222501.

The Office of the Attorney General (the "OAG") received a request from the Texas Board of Architectural Examiners (the "board") for "all information related to the development and issuance of Attorney General Opinion No. DM-161." The OAG states it will release most of the requested information. The OAG asserts the remainder is excepted from disclosure under sections 552.107 and 552.111 of the Government Code. We have considered the exceptions the OAG claims and reviewed the submitted sample of information.<sup>1</sup> We also considered the comments submitted by the board. *See* Gov't Code § 552.304.

First, the board contends that the OAG failed to comply with section 552.301(b) of the Government Code when it initially asserted that the information is excepted from disclosure pursuant to all of the exceptions in the Public Information Act (the "Act"). Section 552.301(b) requires a governmental body to ask for a decision from this office and state the exceptions that apply within ten business days after it receives a written request. Contrary

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<sup>1</sup>We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

to the board's contention, the OAG did assert the specific exceptions within the mandated deadline. The specific exceptions the OAG raised are all of the Act's exceptions. Thus, the OAG complied with section 552.301(b).

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made "for the purpose of facilitating the rendition of professional legal services" to the client governmental body. TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Texas Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in a capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a *confidential* communication, *id.* 503(b)(1), meaning it was "not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication." *Id.* 503(a)(5). Whether a communication meets this definition depends on the *intent* of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no writ). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

The OAG states that the documents at issue are communications between attorneys and staff of the Opinion Committee made in furtherance of providing legal services. However, the board argues that the OAG acted as its lawyer when the OAG drafted Attorney General Op. DM-161 (1992) in response to the board's request for an opinion under section 402.042 of the Government Code. As a result, the board concludes that, as the OAG's client, it is entitled to the information at issue. Section 402.042 states that upon request of the head of a state board, the Attorney General "shall issue a written opinion on a question affecting the public interest or concerning the official duties of the requesting person." Gov't Code

§ 402.042. This office addressed this matter in Open Records Decision No. 412 wherein this office stated:

requests for opinions made under . . . article [4399, V.T.C.S., predecessor to section 402.042] are routinely noticed in the Texas Register and answered in formal, published Attorney General Opinions. A person who requests and obtains a formal opinion under article 4399 may not invoke the attorney-client privilege to protect its contents since he must be presumed to be aware that his request will be noticed in the Texas Register and that the answer will be published.

Open Records Decision No. 412 at 1 (1984). The decision then differentiated between a section 402.042 request and a request for representation pursuant to the constitution and section 402.021 of the Government Code:

Rather than a request for a formal Attorney General Opinion under article 4399, the request sought informal legal advice from the assistant attorney general who represents your agency. See V.T.C.S. art. 581-3 (attorney general to represent Securities Board in certain matters). We believe that a state agency, as a client of the attorney general, article IV, section 22 of the Texas Constitution, has the right to invoke the attorney-client privilege to protect the contents of legal correspondence that it receives from the assistant attorney general who represents it.

*Id.* at 1-2; *see* Tex. Const. art. IV, § 22 (the Attorney General shall represent the state in all suits and give legal advice in writing to executive officers when requested by them); Gov't Code § 402.021 (the Attorney General shall prosecute and defend all actions in which the state is interested). Thus, the board was not the OAG's client when it requested an opinion under section 402.042 from the Opinion Committee, and therefore, may not invoke the attorney-client privilege.

Further, the OAG explains "these documents were not intended to be disclosed and have not been disclosed to third persons other than those to whom disclosure was made in furtherance of the rendition of professional legal services." Based on the OAG's arguments and our review of the submitted information, we agree that the OAG may withhold the information under section 552.107(1). Because section 552.107 is dispositive, we do not address the OAG's section 552.111 assertion.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the

governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

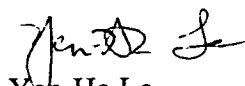
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Tex. Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Yen-Ha Le  
Assistant Attorney General  
Open Records Division

YHL/sdk

Ref: ID# 222501

Enc: Submitted documents

c: Ms. Cynthia Hamilton  
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(w/o enclosures)